No. 80-756

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, AND ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION, PETITIONERS

v.

GRAY PANTHERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

Petition Filed November 10, 1980
Certiorari Granted January 26, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-756

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, AND ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION, PETITIONERS

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1978		
Apr	13	COMPLAINT; appearance.
Apr	13	SUMMONS (4) & copies (4) of complaint issued. U.S. Atty. ser 4-12-78; defts #1 & 2 ser 4-17-78.
Apr	21	ORDER filed 4-18-78 striking the names of the officers of the Executive Branch of the Govt. sued in their individual names & capacities as defts; directing that the case shall proceed against the defts by official title or office only; directing the Clerk of this Court to correct all of its records in this case. (N) (Signed 4-17-78) RICHEY, J.
Apr	27	CERTIFICATE of service by atty for pltf of service of summons & complaint upon Attorney General on 4-17-78; attachment.
June	19	ANSWER of defts to complaint; appearance of Anthony J. Steinmeyer & Rebecca L. Ross.
June	19	CALENDARED. CD/N
July	07	REQUESTS of pltfs for production of documents & interrogatories & requests for admissions; exhibits A-C.
July	27	STATUS CALL: All discovery to be completed by 8-21-78; cross-motions for summary judgment to be filed by 9-8-78; replies to be filed by 9-18-78. (Rep: T. Dourian) RICHEY, J.
July	27	STIPULATION extending time to 8-7-78 for defts to respond to pltfs request for admission & defts time to respond to pltfs interrogatories & requests for production of documents to 8-21-78. Approved. (Fiat) (N) RICHEY, J.
Aug.	07	RESPONSE by defts. to requests for admission.
Sept	08	MOTION of pltfs for partial summary judgment; statement of facts not genuinely at issue; P&A; exhibits A-J.
Sept	08	MOTION of defts for summary judgment; P&A; statement of material facts not in dispute.
Sept	13	MOTION of pltf for enlargement of time on consent for filing reply briefs on cross-motions for summary judgment.
Sept	20	ORDER filed 9-18-78 enlarging time to & including 10-13-78 for submission of reply briefs by all par-

ties; permitting the defts to submit a supplemental reply brief by 10-20-78. (N) RICHEY, J.

1978

Oct. 13 REPLY MEMORANDUM by Pltff.; Table of Contents; Table of Authorities; Exhibit A & B

Oct 13 OPPOSITION by defts. to pltff's [*sic*] motion for partial summary judgment; table of contents; table of authorities.

Oct 23 RESPONSE of defts to pltf's reply memo concerning constitutional issues; table of contents & authorities; exhibit.

Oct 23 RESPONSE of defts to request for production of documents.

Oct 23 RESPONSE of defts to interrogatories; affidavit of Mary S. Kenesson; affidavit of Thomas P. McCormack.

Nov 16 SUPPLEMENTARY exhibits submitted by pltf in support of motion for summary judgment; exhibits (5).

Nov 21 NOTICE of defts of filing; affidavit of John M. Bayne.

Nov 22 STIPULATION with respect to new regulations. Approved. (Fiat) (N) RICHEY, J.

Nov 24 NOTICE by deft of filing; affidavit of Elizabeth J. Barnes.

Dec 12 MEMORANDUM Opinion filed 12-8-78. (N) RICHEY, J.

Dec 12 ORDER filed 12-8-78 granting motion of pltf for summary judgment as to count 1; denying motion of defts for summary judgment; directing that certain regulations are in violation of the Social Security Act; enjoining defts to rescind certain regulations. (N) RICHEY, J.

Dec 13 MOTION of defts to amend order & judgment; P&A.

Dec 22 MEMORANDUM of pltf in partial opposition to motion of defts for amendment of order & judgment.

1979

Jan 05 ORDER filed 1-3-79 amending paragraphs 3 & 4 & adding an additional paragraph to the Court's Order of 12-8-78. (N) RICHEY, J.

Feb 08 MOTION of pltf for order setting schedule for compliance with the Court's previous orders; memo in support of motion; exhibits A-C; affidavit of John H. Foard, attachments (3).

Feb	22	NOTICE of appeal by defts from final judgment entered 12-8-78 & amended 1-3-79. Copy mailed to Toby Edelman. Govt.—no fee.
Feb	22	MOTION of defts for extension of time in which to respond to motion for order setting schedule; P&A.
1979		
Feb	22	MOTION of defts for stay of judgment pending appeal; affidavit of Richard Heim; P&A in support of motion for stay of judgment & in opposition to motion of pltf for order setting schedule.
Mar	05	ORDER filed 2-27-79 extending time to & including 2-22-79 for deft to oppose motion for order setting schedule. (N) RICHEY, J.
Mar	07	CHANGE of address for atty for pltfs. CD/N
Mar	07	MEMORANDUM of pltfs of P&A in opposition to motion of defts for a stay pending appeal & in reply to opposition of defts to motion of pltfs for order setting schedule for compliance with the court's previous order.
Mar	20	MEMORANDUM of defts of P&A in reply to memo of pltf in opposition to motion of defts for a stay pending appeal.
Mar	23	ORDER filed 3-20-79 denying motion of defts for stay & motion of pltf for an order requiring defts to implement Court's previous order & directing defts to submit to the Court a brief report concerning actions taken in implementing Court's order within sixty (60) days. (N) RICHEY, J.
Mar	27	RECORD on appeal delivered to USCA. Receipt acknowledged (79-1334).
May	21	COPY of order from USCA dated 5-18-79 denying motions of appellants for a stay pending appeal & for a temporary stay, except as to that part of the District Court's order of 3-20-79 requiring the appellants to submit to the District Court by 5-21-79 a brief report concerning the actions they have taken to implement the order. The USCA extends that period until 5-29-79.
June	12	MOTION by pltf. for an order requiring defts' full compliance with this Court's Order of 12-08-78 and 1-3-79; P&A; table of contents; table of authorities; exhibit A.
June	22	MEMORANDUM of defts in opposition to motion of pltf for an order requiring defts compliance with

this Court's orders of 12-8-78 & 1-3-79 & response to pltf's accompanying memo.

July 30 ORDER filed 7-26-79 denying motion of pltf requiring full compliance with previous orders of this Court. (Signed 7-25-79) (N) RICHEY, J.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

GRAY PANTHERS

v.

ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL., APPELLANTS

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS	Filed
(D)3-27-79	Certified Original Record (2 vols.) (n-2)	
(T)4-20-79	4-Appellant's (Federal) motion for stay pending appeal (m-19)	
(T)4-27-79	4-Appellee's motion to extend time to file opposition to appellant's motion for stay pending appeal to May 7, 1979 (m-26)	
(E)5-2-79	Clerk's order granting appellee's motion to extend time to file opposition to motion for stay to May 7, 1979	
(D)5-4-79	4-Appellants' erratum for motion for stay (m-1) (OK RB)	
(C)5-7-79	25-Appellants' brief (m-7)	
(C)5-7-79	4-Appellee's (Gray Panthers) opposition to appellant's motion for stay (m-7)	
(C)5-15-79	Letter dated 5/14/79 from Clerk to Edith S. Marshall, Attorney-at-Law advising that her appearance will be removed from the docket is [*sic*] an application for admission is not received	
(T)5-17-79	4-Appellants' emergency motion for a temporary stay pending a ruling on their motion for stay pending appeal and memorandum in support (m-17)	

DATE	FILINGS—PROCEEDINGS	Filed
(D)5-18-79	4-Appellee's opposition to appellants' emergency motion for a temporary stay pending a ruling on their motion for stay pending appeal and memorandum in support (p-18)	
(E)5-18-79	Per Curiam order denying appellants' motions for a stay and for a temporary stay except as to that part of the District Court's order of March 20, 1979 requiring the appellants to submit to the District Court by May 21, 1979 a brief report concerning the actions they have taken to implement the order. The Court hereby extends that period until May 29, 1979; Fahy, Senior CJ, McGowan, CJ and Robb, CJ (who did not participate)	
(D)5-21-79	4-Appellants' (Federal) response to appellee (Gray Panthers) opposition to appellant' motion for a stay pending appeal (m-17)	
(D)5-24-79	4-Appellants' consent motion to proceed under Rule 30(c), deferred appendix (m-4)	
(C)5-29-79	10-Joint appendix	
(C)5-29-79	4-Exhibits for appendix	
(E)5-31-79	Clerk's order granting the motion to proceed under Rule 30(c)	
(C)6-5-79	15-Appellee's brief (m-5)	
(T)6-22-79	15-Appellants' reply brief (m-22)	
(D)7-30-79	Certified Original Supplemental Record (n-2)	
(D)10-29-79	4-Letter from counsel for appellee advising of additional authorities pursuant to FRAP 28(j) (m-23)	
(C)1-4-80	Letter dated 1/5/80 from Clerk to counsel for appellant advising that a more informative 8(c) certificate is needed within the next 5 days.	
(T)1-4-80	Clerk's order, sua sponte, that the following times are allotted for oral argument Appellant—15 minutes; appellee—15 minutes; only one counsel per side will be allowed to argue	
(C)1-8-80	4-Letter from counsel for appellee in response to Clerk's letter of 1/4/80	
(E)1-15-80	Argued before CJ Wright*, MacKinnon, CJ and CJ Markey, US Court of Customs and Patent Appeals; On motion of Toby Edelman, Gill Deford a member of the bar of the Supreme Court of California was allowed to argue pro hac vice for appellee	

DATE	FILINGS--PROCEEDINGS	Filed
(D)2-6-80	4-Letter from counsel for appellee advising of additional authorities pursuant to Rule 28(j), FRAP (m-5)	
(D)4-11-80	4-Letter from counsel for appellant advising of additional authorities pursuant to Rule 28(j), FRAP (m-11)	
(R)7-29-80	Opinion for the Court filed by Chief Judge Wright	
(R)7-29-80	Opinion concurring in part and dissenting in part filed by Circuit Judge MacKinnon	
(R)7-29-80	Judgment affirmed and the case is remanded to the District Court with direction to remand it to the Secretary for reconsideration, consistent with the opinion of this Court filed herein this date	
(T)08-12-80	4-Appellants' motion to extend time to file a suggestion for rehearing en banc (m-12)	
(H)8-12-80	Ordered by the court that dissenting opinion be amended as follows: (See order).	
(C)08-08-80	4-Appellee's bill of costs (m-5)	
(B)80-25-80	Per Curiam order, sua sponte, that appellants' motion to extend time is granted and the time within which parties may file a suggestion for rehearnig, en banc, is extended to 9-11-80; CJ Wright, MacKinnon, CJ, and CJ Markey, US Court of Customs and Patent Appeals	
(H)9-3-80	Per Curiam order amending opinion of 7/29/80.	
(H)10-1-80	Copy of opinion and certified copy of judgment, 2 amending orders and bill of costs in the amount of $52.16 issued to District Court.	
(T)10-07-80	Receipt dated 10/6/80 from Clerk, District Court for 2 volumes of original record and supplemental record	
(C)10-23-80	Copy of letter from Clerk, Supreme Court extending time to file petition for writ of certiorari to 11/10/81 in SC No. A-336 on 10/20/80	
(T)11-21-80	Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-756 on November 10, 1980	
(T)01-28-81	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-756 on January 26, 1981	
(T)02-11-81	Clerk's order that the Clerk of this Court shall certify and transmit, as soon as the business of his office	

DATE	FILINGS—PROCEEDINGS	Filed
	permits and without fee, to the Supreme Court of the United States, a record consisting of all documents, including briefs and appendices, filed in this case. The Clerk shall also transmit to the Supreme Court the Certified Original Record and Certified Supplemental Record, filed herein on March 27, 1979 and July 30, 1979, respectively	
(T)02-18-81	2 volumes of original record and supplemental record returned from Clerk, District Court pursuant to order of 2/11/81	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[FILED
April 13 1978]

78-0661

GRAY PANTHERS
3700 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 382-6644, PLAINTIFF,

vs.

ROBERT A. DERZON, ADMINISTRATOR
HEALTH CARE FINANCING ADMINISTRATION
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
P.O. Box 2366
Washington, D.C. 20013
and
JOSEPH CALIFANO, JR., SECRETARY
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
200 Independence Avenue, S.W.
Washington, D.C. 20201,
DEFENDANTS

COMPLAINT

(For Mandamus, Declaratory and Injunctive Relief)

1. This is an action against the Secretary of the Department of Health, Education, and Welfare (hereinafter "HEW") and the Administrator of the Health Care Financing Administration of the Department, seeking the promulgation and implementation of regulations which would ensure that states participating in the Medical Assistance program (commonly and hereinafter referred to as

"Medicaid") 42 USC § 1396 *et seq.*, are in compliance with the Medicaid statute and the Constitution. The case challenges HEW's policy of implementing regulations which permit some states to deem income available from non-institutionalized spouses to pay for the cost of care of institutionalized Medicaid recipients when in fact that income is not available or is not reasonably available. The policy is in violation of Section 1902(a)(17) of the Social Security Act, 42 USC § 1396a(a)(17), and of the due process clause of the Fifth Amendment to the Constitution.

I. *JURISDICTION*

2. Jurisdiction is conferred on this court by the Mandamus Act, 28 USC § 1361, by 28 USC § 1331, and by the United States Constitution. There is an actual controversy between plaintiffs and defendants, and plaintiffs request a declaration of rights under the Declaratory Judgment Act, 28 USC § 2202.

II. *PARTIES*

3. Plaintiff GRAY PANTHERS is a national organization with headquarters in Philadelphia, Pennsylvania. Its membership is composed of thousands of persons throughout the United States who seek to reform and improve various laws and institutions that affect the lives of our nation's elderly, including health benefit programs such as the federally-sponsored Medicaid program. Approximately two-thirds of the Gray Panthers' membership is composed of individuals who are themselves elderly (65 years of age or older), and the regulations which are here challenged primarily affect elderly Medicaid recipients and their non-institutionalized spouses. Consequently, many members of the Gray Panthers are affected by the procedure here challenged.

4. Defendant JOSEPH CALIFANO, Jr., is Secretary of the Department of Health, Education and Welfare, and as such is charged with the administration of Title XIX of the Social Security Act, 42 USC § 1396 *et seq.*, the Medicaid program. In carrying out this charge, defendant Califano

owes plaintiff a duty to implement regulations which comply with the Medicaid statute and the Fifth Amendment to the Constitution. Defendant is sued in his official capacity and as a representative of all other administrative officers and employees responsible for implementing the Medicaid program.

5. Defendant ROBERT A. DERZON is the Administrator of the Health Care Financing Administration, the arm of the Department of Health, Education and Welfare charged with the promulgation of rules and regulations governing the implementation of Medicaid throughout the country. In carrying out this charge, defendant Derzon owes plaintiff a duty to implement regulations which comply with the Medicaid statute and the Fifth Amendment to the Constitution. Defendant is sued in his official capacity and as a representative of all other administrative officers and employees responsible for implementing the Medicaid program.

III. *STATUTORY AND REGULATORY FRAMEWORK*

6. Medicaid is a cooperative federal-state program established pursuant to Title XIX of the Social Security Act, 42 USC § 1396 *et seq.* In accordance with the Act, the Secretary of Health, Education and Welfare promulgates regulations, through the Administrator of the Health Care Financing Administration, which, in addition to the statutes, provide the framework in which participating states must develop and operate their Medicaid programs.

7. Participating in Medicaid is voluntary with the individual states, but once a state has chosen to participate, it is bound to construct its state-administered Medicaid program within the framework described by statute and federal regulations. At present, forty-nine states, the District of Columbia, and several other jurisdictions participate in the Medicaid program. Only Arizona among the states does not provide Medicaid to its citizens.

8. The federal government pays for at least 50% of each state's Medicaid costs, with the exact percentage dependent on a flexible formula.

9. The states are required to submit state Medicaid plans to HEW for approval. HEW's approval of a state plan ensures the provision of federal matching funds to the state. Without HEW's approval, a state is forced to bear the entire cost of the care which it provides. HEW's approval is in theory dependant on a state plan meeting the guidelines provided by the statute and implementing regulations.

10. Section 1902 of the Social Security Act, 42 USC § 1396a, provides, in pertinent part:

> "(a) A state plan for medical assistance must—
>
> * * * * *
>
> (17) include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient . . . , (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child. . . .

11. Prior to April 13, 1977, all participating states were subject to the same controlling federal regulations. Section 248.3 of Title 45 of the Code of Federal Regulations stated in part:

> "(b) With respect to both the categorically needy and, if they are included in the [State] plan, the medically needy, a State plan must:
>
> (1) Provide that only such income and resources as are actually available will be considered and the income and resources will be reasonably evaluated.
>
> (2) Provide that financial responsibility of any individual for any applicant or recipient of medical assistance will be limited to the responsibility of spouse for

spouse and of parents for children under age 21, or blind, or disabled.

(3) Specify the extent to which the financial responsibility of any such relatives is taken into account."

12. On the basis of section 1902(a) of the Act and these regulations, states were expected to evaluate the eligibility of individuals applying for Medicaid who required institutionalization and whose spouses continued to live in the couple's home.

13. Despite the statutory admonition that only "available" income should be considered, the regulatory requirement that only "actually available" income should be considered, the statute's pronouncement that states should make "reasonable" evaluations of income and resources, and other requirements in the statute and regulations, most states, with the explicit and implicit approval of HEW, considered an arbitrary portion of the income of non-institutionalized spouses available for the care of institutionalized spouses whether in fact that income was available and whether the non-institutionalized spouse was actually able to make such an amount available.

14. This imputing of income on the basis of an arbitrary formula, without regard to the actual needs of the non-institutionalized spouse, is commonly known as "deeming", since the income is deemed available without regard to whether in fact it is available.

15. The effect of this procedure is to place the non-institutionalized spouse in the dilemma of either paying the deemed amount, with the consequent effects on his or her existence, or of not paying it, with the result that the institutionalized spouse will be evicted. The latter result occurs because Medicaid is only paying to the nursing home that portion of the cost of care which is not deemed available for the non-institutionalized spouse.

IV. *THE CHALLENGED REGULATIONS*

16. On December 31, 1975, HEW proposed new regulations on this issue. Their avowed purpose was stated in the preamble to the regulations:

> The proposed regulations is [sic] to ensure that persons who apply for Medicaid as non-cash assistance recipients will have the income and resources of spouses and parents deemed available to them, and considered in determining their financial eligibility, consistent with the provisions of the cash assistance category on which their financial eligibility is based. . . .

40 F.R. 60074 (Dec. 31, 1975).

17. These new regulations were finalized in different form in the Federal Register of January 13, 1977, to be effective three months from that date. 42 F.R. 2684 (Jan. 13, 1977).

18. The introductory language of the regulations now reads, in part:

> (b) With respect to both the categorically needy and, if they are included in the plan, the medically needy, a State plan must:
>
> (1) *General.* Provide that only such income and resources *as are considered available under the provisions of this section* may be considered as an applicant's or recipient's income in determining eligibility or the amount of assistance and that income and resources will be reasonably evaluated.

42 C.F.R. § 448.3 (formerly 45 C.F.R. § 248.3), 42 F.R. 2686 (emphasis added).

19. The effect of this new introductory language is the imposition of different requirements amongst the various jurisdictions. The thirty-four states and the District of Columbia which automatically provide Medicaid assistance to recipients of Supplementary Security Income ("SSI") "are now specifically required to use the SSI rules on availability of income." 42 F.R. 2685. In the other jurisdictions, "those imposing more restrictive criteria under section 1902(f) [of the Social Security Act, 42 USC § 1396a

(f)]," different regulations, theoretically derived from the Medicaid statute, can be utilized.

20. In these latter jurisdictions, the new regulations, by reference to the states' earlier plans, essentially permit the use of the same procedures which were in effect prior to April 13, 1977. The only caveat is that these procedures "not be more restrictive than that included in the State's January 1972 Title XIX [Medicaid] plan." 42 C.F.R. § 448.2(b)(4), (formerly 45 C.F.R. § 248.3(b)(4)). In effect, the new regulations permit these jurisdictions, and any others which may later utilize the option of 42 USC § 1396a(f), to arbitrarily deem income available from non-institutionalized spouses which may not in fact be available and with no limitations as to the length of time that this procedure can be utilized.

21. At present, fifteen states have chosen the optional basis for Medicaid eligibility provided by 42 USC § 1396a(f) and are therefore subject only to the provisions of 42 C.F.R. § 448.3(b)(4). These states are: Colorado, Connecticut, Hawaii, Illinois, Indiana, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Utah, and Virginia. In addition, Puerto Rico, Guam, and the Virgin Islands use these regulations.

22. Defendants have determined that 42 USC § 1396a(f) allows a state to opt at any time for the use of its more restrictive January, 1972, eligibility guidelines. Some states are either considering or have already taken steps to change the basis of their Medicaid eligibility from SSI to their more restrictive January, 1972, guidelines.

23. At least one of these "SSI states", North Dakota, has already submitted a new state plan to the HEW regional office in Denver, and is therefore eligible to use more restrictive eligibility procedures, including 42 CFR § 448.3(b)(4), prior to approval on the assumption that the plan will be approved, in accordance with 42 CFR § 401.3(g).

V. *IRREPARABLE HARM, INADEQUACY OF REMEDY AT LAW*

24. Defendants' continuing violation of the Constitution and of the Social Security Act is now causing, and, unless restrained by the court, will continue to cause irreparable harm to members of the plaintiff organization. Plaintiff has no adequate remedy at law. The harms which members of the plaintiff organization are suffering and will continue to suffer if defendants are not enjoined from their illegal and unconstitutional acts are not susceptible of redress by an award of money damages.

FIRST CLAIM FOR RELIEF

25. The "deeming" of income from a non-institutionalized spouse to an institutionalized Medicaid recipient is in violation of 42 USC § 1396a(a)(17). Defendants' regulations which permit those jurisdictions using more restrictive guidelines to deem income in contradiction to § 1396a(a)(17) violate the Administrative Procedure Act.

SECOND CLAIM FOR RELIEF

26. The "deeming" of income creates an irrebuttable presumption that a non-institutionalized spouse is capable of paying the amount arbitrarily determined by the state and also assumes that the amount will actually be available for the care of the institutionalized spouse. Such irrebuttable presumptions are in violation of the due process clauses of the Fifth and Fourteenth Amendments.

THIRD CLAIM FOR RELIEF

27. The deeming of income imposes an additional eligibility condition on otherwise eligible Medicaid recipients, thereby creating two classes of recipients. One consists of unmarried institutionalized Medicaid recipients, and the other consists of married institutionalized Medicaid recipients. The discriminatory treatment of the class of married institutionalized Medicaid recipients, whose continued receipt of necessary health care is dependent upon meeting

an additional eligibility condition (the payment of an arbitrary amount by their non-institutionalized spouses), is irrational and capricious, and therefore violates the equal protection component of the due process clause of the Fifth Amendment.

REQUEST FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

1. Assume jurisdiction over this case.

2. Enter a permanent injunction pursuant to Rule 65, Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents, employees and all other persons acting in concert with them, from proposing or implementing federal regulations which require or permit states to deem a portion of the income of a non-institutionalized spouse of an institutionalized Medicaid recipient or applicant available without regard to the actual living costs of the non-institutionalized spouse and without regard to whether in fact that amount is made available.

3. Declare that defendants' present regulations on this issue, 42 C.F.R. § 448.3(b), are in violation of the Social Security Act and the due process clause of the Fifth Amendment.

4. Order defendants to rescind the present regulations, to require all relevant jurisdictions to cease deeming of income for any length of time between institutionalized Medicaid recipients and their non-institutionalized spouses, and to promptly propose and publish new regulations which conform with the statute and Constitution.

5. Award plaintiff their costs incurred herein, including reasonable attorneys' fees.

6. Grant such other and further relief as to the Court seems just and proper.

DATED: April 12, 1978

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By _____
STEPHEN ALLEN

By _____
TOBY EDELMAN

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
[JUNE 19, 1978]

Civil No. 78-0661

GRAY PANTHERS
3700 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 382-6644, PLAINTIFF,

v.

ROBERT A. DERZON, ADMINISTRATOR
HEALTH CARE FINANCING ADMINISTRATION
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
P.O. Box 2366
Washington, D.C. 20013
and
JOSEPH CALIFANO, JR., SECRETARY
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
200 Independent Avenue, S.W.
Washington, D.C. 20201,
DEFENDANTS.

ANSWER

FIRST DEFENSE

Defendants, by their undersigned attorneys, hereby answer the numbered paragraphs of the Complaint as follows:

1. The first and second sentences of this paragraph contain plaintiff's description of its action and not allegations of fact to which an answer is required, but insofar as an answer may be deemed required, deny. Deny the third sentence of this paragraph.

2. This paragraph contains plaintiff's jurisdictional allegations to which no answer is required, but insofar as an answer may be deemed required, deny.

3. Deny for lack of information or knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph.

4. Admit the first and third sentences. The second sentence contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, deny.

5. Admit the first and third sentences. The second sentence contains conclusions of law and not averments of fact to which an answer is required, but insofar as an answer may be deemed required, deny.

6. Admit.

7. Admit.

8. Admit.

9. Admit and aver that HEW's approval is dependent on a state plan meeting the guidelines provided by the statute and implementing regulations.

10. This paragraph contains conclusions of law and not averments of fact to which an answer is required. The Court is respectfully referred to the 42 U.S.C. § 1396a for a full statement of its terms.

11. Deny, except to admit that the quotation from the regulation is accurate and respectfully refer the Court to 45 C.F.R. § 248.3 for a full statement of its terms.

12. Deny, except to admit that section 1902(a) of the Act and the regulations cited are one basis on which states were expected to evaluate the eligibility of individuals applying for Medicaid who required institutionalization and whose spouses continued to live in the couple's home.

13. Deny.

14. Deny except to admit that "deeming" is the appropriate term for the imputing of income from one spouse to another.

15. Deny for lack of knowledge or information sufficient to form a belief as to the truth of these allegations.

16. Admit and respectfully refer the Court to 40 F. Reg. 60074 (Dec. 31, 1975) for a full statement of the terms of the proposed regulations.

17. Admit.

18. Admit and respectfully refer the Court to the regulations for a full statement of their terms.

19. Deny the first sentence. Admit the second and third sentences and aver that the regulations followed by states exercising the 1902(f) (42 U.S.C. § 1396a(f)) option are in fact derived from the Medicaid Statute.

20. Admit the first and second sentence. Deny the third sentence.

21. Deny the first sentence except to admit that presently fifteen states have chosen the optional basis for Medicaid eligibility provided by 42 U.S.C. § 1396a(f). Admit the second and third sentences.

22. Admit.

23. Admit.

24. Deny.

25. Deny.

26. Deny.

27. Deny.

The defendants hereby specifically deny all of the allegations of the complaint not hereinbefore otherwise answered.

SECOND DEFENSE

Plaintiff has failed to state a claim upon which relief can be granted.

Wherefore defendants respectfully request that this action be dismissed.

Respectfully submitted,

/s/ _____
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

/s/ _____
ANTHONY J. STEINMEYER

/s/ _____
REBECCA L. ROSS

Attorneys, Department of Justice
Washington, D.C. 20350
Tel: (202-739-2230)
Attorneys for Defendants

Of Counsel:

ROBERT P. JAYE
Deputy Assistant General Counsel

EDITH S. MARSHALL
Attorney, Department of Health, Education and Welfare
Washington, D.C. 20201

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served this 15th day of June, 1978 by mailing a copy thereof to

GILL DEFORD, ESQ.
NEAL S. DUDOVITZ, ESQ.
National Senior Citizens Law Center
1709 West Eighth Street, Suite 500
Los Angeles, California 90017

STEPHEN ALLEN, ESQ.
TOBY EDELMAN, ESQ.
National Senior Citizens Law Center
1200 Fifteenth Street N.W., Suite 500
Washington, D.C. 20005

/s/ _____
REBECCA L. ROSS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SEPTEMBER 8, 1978]

Civil Action
No. 78-0661

GRAY PANTHERS
3700 Chestnut Street
Philadelphia, Pennsylvania 19104
(215) 382-6644, PLAINTIFF,

v.

ADMINISTRATOR
HEALTH CARE FINANCING ADMINISTRATION
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
P.O. Box 2366
Washington, D.C. 20013
and
SECRETARY
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
200 Independence Avenue, S.W.
Washington, D.C. 20201, DEFENDANTS.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT ONE

Pursuant to Rule 56(a), F.R.Civ.P., plaintiff hereby moves for summary judgment on the first clause of action on the grounds that the complaint raises no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

Plaintiff's motion is based on the complaint on file herein, the memorandum of points and authorities filed in support of this motion with accompanying affidavits and exhibits, the responses to requests for admissions and in-

terrogatories and the statement or material facts not genuinely in dispute. The motion is accompanied by a proposed order granting summary judgment to plaintiff.

In accordance with Rule 1-9(f), Local Rules for the United States District Court for the District of Columbia, plaintiff hereby requests an oral hearing on this motion.

DATED: September, 8th 1978.

Respectfully submitted,

GILL DEFORD
NEAL S. DUDOVITZ
National Senior Citizens Law Center
1636 West Eighth Street,
Suite 201
Los Angeles, California 90017
Telephone: (213) 388-1381

STEPHEN ALLEN
TOBY EDELMAN
National Senior Citizens Law Center
1200 Fifteenth Street, N.W.,
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Washington, D.C. 20005
Telephone: (202) 872-1404

By _____
STEPHEN ALLEN

By _____
TOBY EDELMAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[SEPTEMBER 8, 1978]

Civil No. 78-0661

GRAY PANTHERS, PLAINTIFF,

v.

ADMINISTRATOR,
HEALTH CARE FINANCING ADMINISTRATIONS, ETC., ET AL., DEFENDANTS.

MOTION FOR SUMMARY JUDGMENT

Defendants, Robert A. Derzon, Administrator, Health Care Financing Administration, Department of Health, Education and Welfare and Joseph A. Califano, Jr., Secretary of the Department of Health, Education and Welfare, by their undersigned attorneys, hereby move this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order entering summary judgment in their favor. The grounds for this Motion are that there are no material facts in dispute and defendants are entitled to judgment as a matter of law.

In support of this Motion the Court is respectfully referred to the Memorandum of Points and Authorities In Support Thereof and the Statement of Material Facts Not In Dispute attached hereto.

Respectfully submitted,

/s/ _____
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

/s/ _____
ANTHONY J. STEINMEYER

/s/ _____
REBECCA L. ROSS

Attorneys, Department of Justice
Washingon, D.C. 20530
Telephone: 739-2230

Attorneys for Defendants

OF COUNSEL:

ROBERT JAYE
EDITH MARSHALL
Attorneys,
Department of Health, Education, and Welfare
Washington, D.C. 20201

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[NOVEMBER 22, 1978]

Civil No. 78-0661

GRAY PANTHERS, PLAINTIFF,

v.

ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATIONS, ETC., ET AL., DEFENDANTS.

STIPULATION

The parties, by their undersigned attorneys, hereby stipulate and agree that:

1. Defendants published new regulations governing the medical assistance (Medicaid) program in the Federal Register for Friday, September 29, 1978 (Part V). These appear at 43 Fed. Reg 45176.

2. The new regulations are final, effective October 1, 1978.

3. These regulations are intended to make no change in policy from that of the previous regulations, but to reorganize and rewrite the previous regulations in clearer, simpler language.

4. Former 42 C.F.R. §§ 448.3(b)(1) and (4), which permitted the deeming or imputation of income between spouses separated by institutionalization in the states electing the restricted eligibility option under § 209(b) of P.L. 92-603, have been replaced in part by 42 C.F.R. § 435.734, which has the same effect.

5. Former 42 C.F.R. § 448.21(a)(2), which permitted the deeming or imputation of income between spouses separated by institutionalization in Guam, Puerto Rico and

the Virgin Islands, has been replaced in part by 42 C.F.R. §§ 436.602 and 436.711, which have the same effect.

6. The promulgation of these regulations does not affect the posture of this lawsuit, in the opinion of the parties. In reading the papers submitted in this case the Court is respectfully requested to consider references to the former regulations to include reference to the present regulations.

/s/ _____

REBECCA L. ROSS
Attorney
Civil Division
Department of Justice
10th & Constitution Avenue, N.W.
Room 3136
Washington, D.C. 20530
(202) 663-2230
Attorney for Defendants

/s/ _____

STEPHEN C. ALLEN
Staff Attorney
National Senior Citizens Law Center
1200-15th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 872-1404
Attorney for Plaintiff

Approved:

/s/ Charles R. Richey

UNITED STATES DISTRICT JUDGE

Date: 11/22/78

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[AUGUST 7, 1979]

Civil Action No. 78-0661

GRAY PANTHERS, ETC., PLAINTIFF,

v.

SECRETARY OF THE DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE, ETC.,

and

THE ADMINISTRATOR OF HEALTH CARE
FINANCING ADMINISTRATION, ETC., DEFENDANTS.

NOTICE OF FILING

The defendants hereby file for the record of this case the attached copy of a Regional Letter from the Director of the Medicaid Bureau to the Regional Offices of the Department of Health, Education and Welfare. This letter is provided to the Court and the plaintiff pursuant to the representations previously made by the defendants in their memorandum of June 22, 1979 in opposition to plaintiff's motion for an order requiring defendants' full compliance with this Court's Orders of December 8, 1978 and January 3, 1979.

Respectfully submitted,

/s/ _____
EDITH S. MARSHALL
Special Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing defendants' Notice of Filing has been made upon plaintiff by mailing a copy thereof to counsel for plaintiff, Toby S. Edelman, Esquire, National Senior Citizens Law Center, 1424 16th Street, N.W., Suite 300, Washington, D.C., 20008, and to Gill Deford, Esquire, and Neal Dudovitz, Esquire, National Senior Citizens Law Center, 1636 West 8th Street, Suite 201, Los Angeles, California, 90017, on this 7th day of August, 1979.

/s/ _____

EDITH S. MARSHALL
Special Assistant U.S. Attorney
U.S. Courthouse
Room 3430D
Washington, D.C. 20001

Attachment A 78-0661

[Filed: August 7, 1979
James F. Davey, Clerk]

HCFA
Regional Letter

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Health Care Financing Administration

MEDICAID
Transmittal No.

Originating Component Code DPS

SUBJECT: Deeming of Income in 209(b) States, Guam, Puerto Rico, and the Virgin Islands

This letter provides clarification of HCFA Regional Letter 79-38 issued May 18, 1979, and HCFA Action Transmittal 79-52 issued May 30, 1979. All 209(b) States and the jurisdictions of Guam, Puerto Rico, and the Virgin Islands

are required to cease deeming income between institutionalized applicants *and recipients* and their spouses.

If further information is needed, please contact James Eshelman at (202) 245-0534

DIRECTOR
Medicaid Bureau

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0661

GRAY PANTHERS, ET AL., PLAINTIFFS,

v.

SECRETARY, DEPARTMENT OF HEALTH
AND HUMAN SERVICES, ET AL., DEFENDANTS.

[Filed: OCTOBER 9, 1980]

ORDER

The Court held a status call on October 8, 1980 to ascertain the Department of Health and Human Services' progress in promulgating regulations that comply with the Court of Appeals' mandate in *Gray Panthers v. Administrator*, No. 79-1334 (July 29, 1980).

Upon consideration of the representations made at the status call and the entire record herein, it is, by the Court, this 8th day of October 1980,

ORDERED that the Secretary of the Department of Health and Human Services issue regulations on the following schedule:

1. The proposed regulations shall be published in the Federal Register no later than October 28, 1980.

2. There shall be a public comment period ending December 1, 1980.

3. The final regulations shall be published in the Federal Register no later than December 11, 1980.

/s/ _____
CHARLES R. RICHEY
United States District Judge

Supreme Court of the United States

No. 80-756

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

v.

GRAY PANTHERS

ORDER ALLOWING CERTIORARI. FILED JANUARY 26, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆U.S. GOVERNMENT PRINTING OFFICE: 338917 274